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IN THE

Supreme Court of the United States

1948 TERM

No. 639

ROY C. METZGER, *Petitioner,*

vs.

HANNAH HOSSACK, as Administratrix of the Estate of James W. Hancer, Deceased, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

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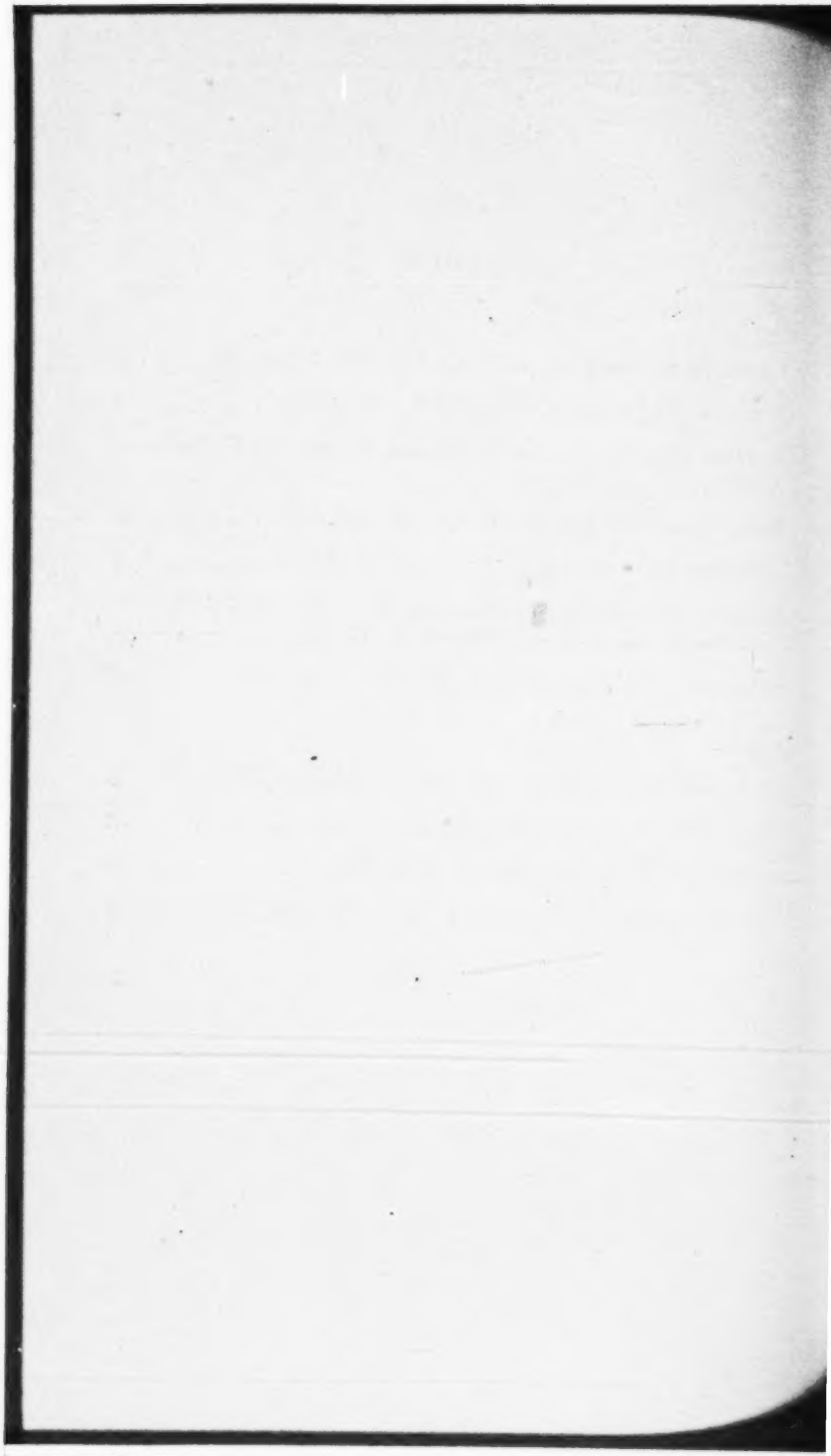

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There has been a complete failure to show any reason why this record should be reviewed by this Court.

Questions involved are of course not of such public importance as to require such review. Petitioner apparently makes no such contention but seems to assert that it is desirable that this Court settle a claimed conflict as to the so-called emergency rule between the Circuit Court of Appeals of the Eighth Circuit and the South Dakota Supreme Court and a further claimed conflict among various circuit courts of appeals.

Such claimed "conflicts" are merely straw men which Petitioner has attempted to create by strained and laborious reasoning. No such conflicts in fact exist.

There is no mystery about the so-called emergency rule. It is simply to the effect that when a person is faced with a sudden emergency, not the product of his own fault, the law makes due allowance for the resulting mental stress and does not hold him to the same standard of careful procedure as would be the case if he had time for cool reflection.

Petitioner, however, advances the astounding proposition that when such an emergency exists, this ends the inquiry and that the law excuses the actor, no matter how foolhardy his conduct and regardless of whether the emergency makes such conduct excusable.

By labored effort Petitioner seeks to deduce such a holding from *Miller vs. Stevens*, 63 S. D. 10, 256 N. W. 152, and numerous other cases cited in his Petition and Brief.

Such holding is not there. The most that could be said of the Stevens case is that the emergency there shown and the circumstances surrounding it were considered such as to permit only one reasonable answer, which was that the involved conduct was excusable. The same is true of other decisions on which Petitioner relies.

There are infinite types of emergencies. Some are of such extreme nature and requiring such quick action that they would excuse almost any conduct. Others are relatively mild, with greater opportunity for selective action. In any emergency case the law of course allows for it. It excuses when the emergency can reasonably be said to be an adequate explanation. It condemns only when the conduct is inexcusable despite the emergency. The ultimate question is whether, after giving the actor the full benefit of the emergency rule, his conduct was such as could have been reasonably expected from the ordinarily prudent man of the same age and experience in the same circumstances.

Like any other fact question, the answer may be so clear, one way or the other, that court direction of a verdict is required, but from its nature the question is usually for the jury. *Restatement of the Law of Torts, Section* 296, *page* 796; 45 *Corpus Juris, Section* 92, *page* 711; 39 *Corpus Juris, Section* 1377, *page* 1200; 35 *American Jurisprudence, Section* 265, *page* 692; *Wittstruck vs. Lee,* 62 *S. D.* 290, 252 *N. W.* 874; *Ulrikson vs. Chicago, Milwaukee, St. Paul and Pacific Railway Co.,* 64 *S. D.* 476, 268 *N. W.* 369; *Campbell vs. Jackson,* 65 *S. D.* 154, 272 *N. W.* 293; *Miller vs. Stevens,* 63 *S. D.* 10, 256 *N. W.* 152; *Elzig vs. Gudwangen,* 8 *Cir.,* 91 *F.* (2*d*) 434; *Hossack vs. Metzger,* 8 *Cir.,* 156 *F.* (2*d*) 501; *Hercules Powder Co. vs. Crawford,* 8 *Cir.,* 163 *F.* (2*d*) 968.

Except as Petitioner has tried to read into the decisions something which is not there, no real conflict of authority appears.

Incidentally, it is interesting to note that at the trial Petitioner advanced no such contention as that which he now makes. "R" followed by an arabic numeral will denote the page of the printed record to which reference is made.

Petitioner's requested instructions, as preserved for appellate review, failed to advance his present conception of the emergency rule. (R 99-100) The trial court's instructions fully covered the question in accord with the rule as above stated. (R 110-111, 114-115) Petitioner did not except thereto. (R 113-115)

While Petitioner's review of the record is far from fair and accurate, we shall not enter into an extended discussion thereof. There was ample evidence to sustain the result.

The action was predicated on the claim that Petitioner's employee Ritter was negligent in that, after the appearance of a spark at the end of the film he was handling, he failed to perform the simple operation of tearing off such strip of film or stepping on the spark and extinguishing it, but negligently so handled the film as to place the ignited portion in contact with the balance, with the resulting disaster. (R 4)

There was credible evidence from which it could have been reasonably found that with the approval of Petitioner's manager Ritter had commenced work at Petitioner's theater with a view of replacing Respondent's decedent as soon as Ritter had sufficient training (R 17-18); that Ritter pursued such work from mid-August until latter October (R 60); that during this time he "handled and wound a great many rolls of film" (R 60); that by the time of the fire he was operating the projection machine alone during part of each performance (R 61); that about four or five weeks before the fire it was reported to Petitioner's manager that Ritter was getting along "all right" and the manager agreed that Ritter's compensation of $15 weekly would then start (R 18, 60); that on the night of the fire Ritter removed a reel of film from a spindle with a loose end four or five feet long dangling toward the floor (R 19-20); that Ritter's attention was then called to a small, smoldering spot, with no flame, about the size of a pea, three or four inches from the end of the film, down near the floor (R 20); that the warning was "Harry, your film is on fire, tear it off" (R 20); that Ritter heard the warning (R 57) but continued winding the reel until the smoldering spot contacted the top of the film, whereupon the whole film burst into flame (R 20); that twelve to fifteen seconds elapsed between the warning and contact between the spark and the main body of the film (R 21); that there were numerous possible causes for the spark at the end of the film, such as getting film in a light beam, contact with hot carbon discharged by the machine onto the floor, friction, sparks from a faulty motor, and contact with an electric light bulb (R 37, 41, 42, 50); that from the appearance of such a spark to actual flashing of the film there might elapse an interval estimated by different experts at from seven to eight seconds to twelve to fifteen seconds (R 37, 41, 51); that such film may be easily torn cross-ways (R 36, 41); that the standard of practice in the industry is that when there is an actual film fire, the film should be discarded, with the operator seeking refuge in flight, but that where there is only a smoldering spot at the end of dangling film, the proper practice is to avert disaster by detaching the ignited film from

the main body, or to extinguish the spark by stepping on it. (R 39, 45, 46, 48, 50)

The foregoing adequately disposes of all questions of master and servant and proximate cause. The evidence was ample to show that under the well understood rules of respondeat superior, Petitioner was responsible for Ritter's acts and that it was within the jury province to conclude that if Ritter had done what he should, the disaster would have been averted.

In the last analysis all that is disclosed by Petitioner's showing is that he wants still further appellate review. He has had a trial—in fact several of them. He has had full opportunity to present his contentions to the Circuit Court of Appeals, which is the court designated by law for appellate review of his case. He has completely failed to show any reason why this Court should review the record.

Respectfully submitted,

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